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IN THE  
**Supreme Court of the  
United States**

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OCTOBER TERM, 1948

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635  
No. ....

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WEST VIRGINIA NORTHERN RAILROAD COMPANY,  
*Petitioner,*

versus

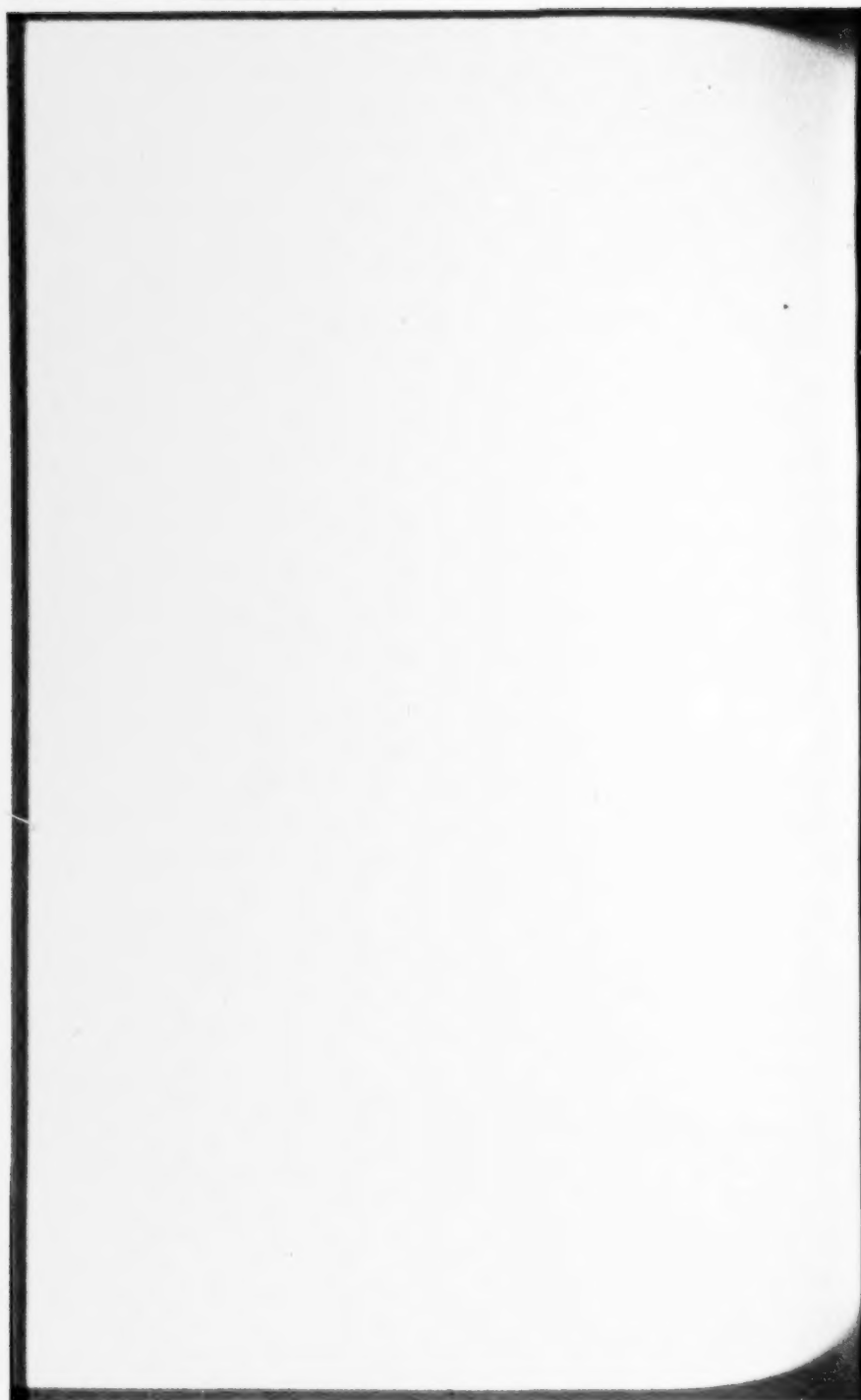
MARGARET R. RILEY, Administratrix  
of the Estate of Henry C. Riley,  
Deceased,  
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF APPEALS OF WEST VIRGINIA, AND  
BRIEF IN SUPPORT THEREOF.**

-----  
HARRY H. BYRER, Martinsburg, W. Va.  
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MELVIN C. SNYDER, Kingwood, W. Va.  
CHARLES V. WEHNER, Kingwood, W. Va.

HARRY H. BYRER,  
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*Of Counsel.*

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE  
ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

The petition of the West Virginia Northern Railroad Company, a Corporation, respectfully represents and shows to this Honorable Court;

**A**

**SUMMARY STATEMENT OF THE MATTERS INVOLVED**

The Supreme Court of Appeals of West Virginia, on December 14, 1948, made and entered an order and opinion by which it affirmed a judgment made and entered by the Circuit Court

of Preston County, West Virginia, on August 5, 1947, in favor of respondent, Margaret R. Riley, Administratrix of the estate of Henry C. Riley, deceased, against the petitioner, West Virginia Northern Railroad Company, for seven thousand five hundred (7,500) dollars, with interest and costs.

Petitioner had for many years prior to, and on January 14, 1946, owned a railroad in Preston County, West Virginia, about eleven miles long, extending from a terminus at Kingwood to a junction at Tunnelton, in said County, with the railroad of the Baltimore and Ohio Railroad Company.

There are located along the line of petitioner's said railroad a number of coal mines, with side tracks connecting the tipples of said mines with petitioner's said railroad, among others being a mine between one and two miles from the terminus of said railroad at Tunnelton, which mine and side track were owned on January 14, 1946, by M. P. Blake, who traded as "Blake Coal Company."

For more than twenty years prior to January 14, 1946, petitioner was continuously a subscriber to the Compensation Fund of the State of West Virginia, and paid into said compensation fund premiums as provided by law on the wages of all of its employees; it is still such subscriber, and still pays into said fund.

Among other laborers employed by petitioner, one Henry C. Riley was employed as a track foreman, and had been employed either as a laborer engaged in track maintenance or as a track foreman for many years, during all of which time petitioner paid premiums on his wages, along with the wages of its other employees, into said compensation fund.

On January 14, 1946, said Henry C. Riley, acting as track foreman for petitioner, was engaged with a crew of petitioner's employees, in removing a worn switch which connected said Blake side track with petitioner's railroad, and in replacing the same with another switch to facilitate the placing of empty coal cars on said side track and the removal of loaded cars therefrom.

On said day said Riley and the men working under him, continued their labors after the usual quitting time. Riley and

several others lived in or near the said Town of Kingwood. About four o'clock in the evening, which was about an hour after the usual quitting time, Riley and a number of those working under him started to go from the said Blake switch to Kingwood, traveling on a motor car, sometimes spoken of in the record as a motor truck, which ran on the railroad track and was propelled by a motor; to that was attached a small car or truck, spoken of sometimes as a "push car." Said motor truck and the attached car carried a number of the laborers and certain tools which they had been using in their work.

It is customary for an engine hauling loaded cars to go out over the road from Kingwood to Tunnelton in the evening, and on this particular evening a train, in charge of a conductor and with an engineer, fireman and brakeman, left Kingwood at about four o'clock in the evening. Riley and his crew had been told that train would be held until they arrived, but either by forgetfulness, or because he misunderstood the instructions of petitioner's superintendent, said conductor took his train out just about the time Riley and his crew were coming in, and in rounding a curve about 1,000 feet from the railroad shops at Kingwood, the engine of said train collided with said motor car or truck, and Henry C. Riley was killed (R. 89 to 103).

The decedent was survived by Margaret R. Riley, his wife, and she was his sole dependent (R. 83). On February 6, 1946, she verified an application which she filed with the Compensation Commissioner for an award of compensation (R. 65 to 68).

As appears from said application itself, this application was made because of the death of her husband; apparently that application was intended, not only for benefits for the said Margaret R. Riley, but also for Margaret Patricia Riley, a granddaughter, alleged to have been supported by the decedent, but no award was made for the benefit of said grandchild. Neither would said grandchild be entitled to the benefit of a recovery, if any, under the Federal Employers' Liability Act.

The Compensation Commissioner did, on February 14, 1946, award to said Margaret R. Riley, \$30.00 per month, beginning with the date of the death of said Henry C. Riley, and to continue until the death or remarriage of said Margaret R. Riley.

After the making of said award, said Margaret R. Riley was appointed administratrix of the estate of said decedent, on February 13, 1946, and qualified as such (R. 38).

At the May Rules, 1946, the said Margaret R. Riley instituted an action in trespass on the case against petitioner, in the Circuit Court of Preston County, on account of the death of said Henry C. Riley, claiming benefits on account of the maintenance and support which she had a right to expect, and claimed she would have received from the said Henry C. Riley during her life. She sought to recover \$18,000.00 (R. 27 to 39 inc.).

Said action was brought under Title 45, Section 51 of the United States Code, known as the Federal Employers' Liability Act.

As will appear from the record, said declaration charged petitioner with negligence in not furnishing decedent a motor car or truck sufficiently light that it could be removed from the tracks by manual or man power, and averred that it was the duty of petitioner to furnish such light motor car as could be removed from the tracks by manual or man power; that it was the duty of petitioner to equip its track with a signal system, and employ a train dispatcher. It also alleged that petitioner negligently failed to discharge its duties.

It further alleged that petitioner negligently caused the death of said Henry C. Riley by sending out its train and engine, and causing the same to collide with said motor car, as above set forth.

Petitioner filed a written motion to strike from the declaration the allegation regarding the weight of the motor car; regarding the failure to employ a train dispatcher, and to install a signal system, which motion the court overruled (R. 49 and R. 103).

Thereupon petitioner demurred to the declaration, and filed its general issue plea and another plea, designated "No. 2," which plea denied that the decedent at the time of his



death was employed in work in interstate commerce; and its Plea No. 3, setting up the application of the respondent for an award of compensation as aforesaid.

Respondent demurred to Pleas Nos. 2 and 3, and as ground for demurrer, asserted that Plea No. 3 did not present a good defense to the action, because the plaintiff in that suit received no benefits from the compensation fund, as she was suing as administratrix and that acts which she did as the widow and dependent of Riley did not prevent her maintaining a suit as his administratrix (R. 48). The circuit court sustained the demurrer to these two pleas, and certified to the Supreme Court of Appeals of West Virginia the questions presented by the motion to strike out certain parts of the declaration, and questions presented by respondent's demurrer to petitioner's pleas (R. 49).

Said Supreme Court of Appeals refused to docket said certified case, and thereafter petitioner filed in said circuit court its Plea No. 4, in which it denied that the decedent, Henry C. Riley, was employed in interstate commerce when he met his death. Said plea set out more fully than Plea No. 3 had done, the compliance of petitioner with the Workmens' Compensation Law of West Virginia, and that petitioner had paid into the compensation fund of said State an amount of money exceeding by several thousand dollars the total of payments that had been made from said fund on account of injuries suffered by employees of said petitioner; and further showing that on February 11, 1946, there was paid to respondent \$16.45, compensation from January 14 to January 31, 1946, and that thereafter payments had been made of \$30.00 per month, on the first day of each month, and that they would continue to be paid under the award, monthly, during respondent's life; and further showing that at the request of respondent, and on her application, there was paid for said decedent, funeral expenses in the amount of \$150.00 (R. 51-52).

To that plea respondent demurred, and on July 10, 1947, the Circuit Court sustained said demurrer (R. 55). In the meantime the case was tried before a jury, and a verdict for respondent, against petitioner, for \$7,500.00 was returned (R. 56).

Petitioner moved the Court to set aside the verdict and grant petitioner a new trial. The Circuit Court overruled the motion, and entered judgment in favor of respondent, against petitioner for \$7,500.00, with interest and costs (R. 67,78).

The Supreme Court of Appeals of West Virginia granted a writ of error and sepersedeas to the judgment of said Circuit Court, and on December 14, 1948, it affirmed said judgment and rendered a written opinion (51 S.E. 2d 119).

In its order and opinion affirming said judgment, the Supreme Court of Appeals of West Virginia decided important Federal questions in interpreting Title 45, Sections 51 to 60 of the United States Code.

**BASIS ON WHICH IT IS CONTENDED THAT THIS COURT  
HAS JURISDICTION TO REVIEW THE  
JUDGMENT IN QUESTION**

I. Respondent based her action on a Federal Statute, namely, the Federal Employers' Liability Act, and in determining her right to recover as affected by the award and payment of compensation from the compensation fund of West Virginia, the Circuit Court of Preston County, West Virginia and the Supreme Court of Appeals of said State were required to interpret that Federal Act.

II. In its opinion and order in this case the Supreme Court of Appeals of West Virginia, by affirming the judgment of the Circuit Court and by finding that the making of the award of compensation by the Compensation Commissioner of said State to respondent was not res adjudicata that respondent's decedent was engaged in intrastate commerce when he met his death, thus decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

III. The Supreme Court of Appeals is the highest court of West Virginia.

IV. If under the law respondent had a right to recover in her action, regardless of the award of compensation, petitioner was

still entitled to prove the amount of money paid to respondent under said award of compensation, and to have the same applied against any sum the jury might believe sufficient to compensate her for the loss of her said husband. The right to this credit is specifically given by Title 45, Section 55 of the United States Code.

**B.**

**QUESTIONS PRESENTED**

I. Petitioner admits that its conductor was negligent, therefore no question as to negligence is presented.

II. The question is presented whether respondent's decedent was, when killed, engaged in interstate or intrastate commerce as defined by the Federal Employers' Liability Act, unless the award of compensation and the payments thereunder are conclusive of that question.

III. The question is presented also, whether the application for compensation made by respondent, the granting of an award and the receipt of payments thereunder to the time of the trial of said action is conclusive of the question of employment in interstate or intrastate commerce.

IV. If, under all the circumstances, respondent was entitled to recover in her action, did petitioner have a right to prove the making of said award, and the amount paid thereunder, and to have the payments made from said fund to respondent, or for her benefit, applied to reduce whatever amount a jury might find was reasonable compensation to her for her decedent's death.

V. Did the trial court err by rejecting evidence of payments under the compensation award to respondent, and by limiting all evidence regarding compensation to payments into said fund on account of Henry C. Riley; and did the Supreme Court of Appeals of West Virginia err in approving and affirming such action of the Circuit Court?

VI. What effect, if any, does the fact have that respondent applied for an award of compensation in her individual capacity, and that her action at law was instituted by her as the administratrix and sole beneficiary of the estate of Henry C. Riley, deceased?

C.

**SPECIFICATION OF ERRORS**

Before the Supreme Court of Appeals of West Virginia, petitioner assigned numerous errors of the trial court which are not urged here, because probably not presenting Federal questions.

The Supreme Court of Appeals of West Virginia erred in affirming the judgment of the circuit court of Preston County, West Virginia, and in not reversing said judgment, because:

a. The award of \$30.00 per month made by the compensation commissioner of West Virginia to respondent on account of the death of said Henry C. Riley, and which award has become final, and which award was made possible by the payments made into said Workmen's Compensation Fund of West Virginia by petitioner, was *res adjudicata* that, when he was killed, Henry C. Riley was employed in intrastate commerce.

Railroad Co. v. Schendel 270 U. S., 235.  
 Petroleum Company v. Hunt, 320 U. S. 430.

b. If said award of compensation and payment of compensation thereunder was not a bar to the prosecution of respondent's action, petitioner was entitled to introduce evidence before the jury to prove the payments made by it into the compensation fund of West Virginia, and the payments made from said fund to respondent under said award, and to have the jury instructed that such payments should be applied to the reduction of any sum which the jury might believe sufficient to compensate respondent for the loss of her support caused by the death of her decedent.

Title 45, Section 55, United States Code.

The Circuit Court erred by rejecting such evidence and refusing to so instruct the jury, and the Supreme Court of Appeals of West Virginia erred in approving the action of said Circuit Court.

D.

**REASONS RELIED ON FOR THE ALLOWANCE OF  
THE WRIT**

(1) The questions decided by the Supreme Court of West Virginia were questions of substance. It is important, in order that there may be a uniform rule of decisions in state courts in the trial of matters under the Federal Employers' Liability Act, that this Court determine whether under the circumstances of this case an injured employee, or the sole beneficiary of an employee who is killed in the course of his employment, can make an application for an award of compensation, and obtain the same, and after such award has been granted enjoy the benefits thereof for a long period of time, and without refunding the amount received under said award, and while still enjoying the benefits thereof, can recover damages in an action under said Liability Act and deny that she was ever entitled to the award.

(2) The decision of the Supreme Court of Appeals in this case is contrary to the applicable decision of this Court in *Schendel v. Railroad Company*, *Supra*.

(3) The opinion and order of the Supreme Court of Appeals of West Virginia denies to petitioner the right specifically given by Section 55 of Title 45 of the United States Code.

Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Appeals of West Virginia, commanding that Court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on the docket of said Court No. 10045. MARGARET R. RILEY, Administratrix of the Estate of Henry C. Riley, deceased, Plaintiff Below, Defendant in Error, v. WEST

VIRGINIA NORTHERN RAILROAD COMPANY, a Corporation, Defendant Below, Plaintiff in Error; and that said judgment and order of the Supreme Court of Appeals of West Virginia may be reviewed and determined, and that said judgment of said Supreme Court of Appeals may be reversed, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem just. And your petitioner will ever pray.

West Virginia Northern Railroad Company,

By: HARRY H. BYRER  
F. E. PARRACK  
MELVIN C. SNYDER  
CHARLES V. WEHNER,  
*Counsel for Petitioner.*

HARRY H. BYRER,  
F. E. PARRACK,

*Of Counsel for Petitioner.*

**APPENDIX B**

The applicable parts of the Workmen's Compensation Law of West Virginia, to save space and for the purpose of convenience, we merely refer to certain parts of this law without quoting the same in full.

Chapter 23 of the Code of West Virginia of 1943, Article 1, Section 1, provides that there shall be a Compensation Commissioner, and fixes his qualifications. Intervening sections provide for expense of administration, salaries, office hours, records, etc.

Section 5 of Article 1, provides:

"The commissioner shall keep and maintain his office at the seat of the government, and shall provide a suitable room or rooms necessary, office furniture, supplies, books, periodicals, maps and other equipment. After due notice, showing the time and place, the commissioner may hold hearings anywhere within the state, or elsewhere by agreement of claimant and employer, with the approval of the commissioner."

Article 1, Section 8:

"The commissioner, secretary and every inspector or examiner appointed by the commissioner shall, for the purpose contemplated by this chapter, have power to administer oaths, certify official acts, take depositions, issue subpoenas and compel the attendance of witnesses and the production of pertinent books of accounts, papers, records, documents and testimony."

Article 2, Section 1, reads in part:

"All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry or business in this state are employers within the meaning of this chapter, and subject to its provisions.

"All persons in the service of employers as herein defined, and employed by them for the purpose of carrying on the industry, business and work in which they are engaged, including persons

regularly employed in the state whose duties necessitate temporary employment by the same employer without the state of a temporary or transitory nature, and check-weighmen employed according to law, and all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the chief of the department of mines, are employees within the meaning of this chapter and subject to its provisions."

This section excepts employers of employees in domestic or agricultural service, persons prohibited by law from being employed, employees employed without the state except in temporary employment, members of a firm of employers and officers and managers of associations or corporations and elective officials of the state.

Article 2, Section 3 of such chapter provides for blanks for reports, and further as follows:

"Every employer receiving from the commissioner any blank or blanks with direction for filling out and returning the same shall return the same filled out so as to answer fully and correctly all pertinent questions therein propounded, and if unable to do so, shall give good and sufficient reasons for such failure." It further provided the method of making applications by employers to said compensation commissioner.

Article 2, Section 4 provides for the classification of industries, and the amount of premiums to be paid in the separate classes.

Article 2, Section 5 reads in part as follows:

"For the purpose of creating a workmen's compensation fund each employer subject to this chapter shall pay the premiums of liability based upon and being such a percentage of the payroll of such employer as may have been determined by the commissioner and be then in effect. \* \* \*

All sums received by the state compensation commissioner as herein provided shall be deposited in the state treasury to the credit of the workmen's compensation fund in the manner now prescribed by law for depositing money in the state treasury.



"Each employer shall make a payroll report to the commissioner on or before the twentieth of each month for the preceding month, and such report shall be on the form or forms prescribed by the commissioner, and furnish all information required by him."

Article 2, section 8 of said Chapter deprives employers subject to the chapter who have not elected to pay into the workmen's compensation fund of the defense of fellow-servant rule, assumption of risk or contributory negligence in case of suits by employees on account of injuries caused by the negligence of the employer.

Article 2, Section 9 of said Chapter provides for employers providing their own system of compensation and establishes the method of their doing so.

Article 2, section 10 of said chapter reads in part as follows:

"Unless and until the congress of the United States has by appropriate legislation established a rule of liability or method of compensation governing employers and employees engaged in commerce within the purview of the commerce clause of the Federal Constitution (article one, section eight), section one of this article shall apply without regard to the interstate or intrastate character or nature of the work or business engaged in: Provided, however, That this chapter shall not apply to employees of steam railroads, or steam railroads partly electrified, or express companies engaged in interstate commerce."

Article 3, section 1 provides:

"The commissioner shall establish a workmen's compensation fund from the premiums and other funds paid thereto by employers \* \* \* for the benefit of employees of employers who have paid the premium applicable to such employers and have otherwise complied fully with the provisions of section five, article two of this chapter, and for the benefit of the dependents of such employees, and for the payment of the administration expenses of this chapter, \* \* \*."

Ten percent of all that shall hereafter be paid into the workmen's compensation fund shall be set aside for the creation of a surplus fund until such surplus shall amount to the sum of five hundred thousand dollars \* \* \*."

Article 4, section 1 of said chapter reads as follows:

"Subject to the provisions and limitations elsewhere in this chapter set forth, the commissioner shall disburse the workmen's compensation fund to the employees of such employers as are not delinquent in the payment of premiums for the month in which the injury occurs, and who have otherwise complied fully with the provisions of this chapter, and which employees shall have received personal injuries in the course of and resulting from their employment in this state, or in temporary employment without the state, as defined and limited by section one, article two of this chapter, or to the dependents, if any, of such employees in case death has ensued, according to the provisions hereinafter made; and also for the expenses of the administration of this chapter, \* \* \*."

**APPENDIX C****PERTINENT PARTS OF TITLE 45 SECTIONS 51 TO 60,  
BOTH INCLUSIVE, OF THE UNITED STATES CODE**

Section 51: "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason or by reason of any defect or insufficiency, due to its negligence, in the cars, engines, appliances, machinery, track, road bed, works, boats, wharves or other equipment.

Any such employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55: "Any contract, rule or regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: provided, that in such action brought against any such carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

WEST VIRGINIA NORTHERN RAILROAD COMPANY,  
*Petitioner,*

versus

MARGARET R. RILEY, ADMINISTRATRIX  
of the estate of Henry C. Riley,  
Deceased,  
*Respondent.*

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BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI

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OPINIONS BELOW

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STATEMENT OF THE CASE

The petition for writ of certiorari herein, contains a recital of the facts of the case, and, for the sake of brevity, the court is respectfully referred to said statement and to the opinion of the Supreme Court of Appeals of West Virginia. Said opinion is attached as an appendix herewith, and appears also in the Advance Sheets of the South Eastern Reporter No. 51, at pages 119 to 125, both inclusive.

SUMMARY OF ARGUMENT

I

It is a general rule that litigants will not be permitted to take inconsistent positions in connection with the subject matter of litigation.

II

Hurley vs. Hurley, 127 W. Va. 744,  
and cases cited on page 746.  
Winslow v. Railroad Co. 52 L. ed., 388

The Workmen's Compensation Law of West Virginia makes it a crime for one to knowingly make application for an award of compensation to which he is not entitled, or knowingly to secure compensation from said fund to which he is not entitled, such act being a misdemeanor, punishable by a fine not to exceed \$500.00, or imprisonment not to exceed twelve months, or both.

Chap. 23, Art. 4, Sec. 19, Code of West Virginia.

A court should not permit one to rely upon or benefit by his violation of a statute.

*Nemo allegans suam turpitudinem a udiendum est,*  
*U. S. v. Jeffer, 9 L. ed., 642.*  
*Southern Mutual Aid Association v. Blount et al,*  
*70 S. E., 485.*

Said statute requires an employer who subscribes to said compensation fund to make due report of injuries to its employees, or of any employee killed in the course of his employment, and makes any person making a false statement respecting information furnished the commissioner guilty of perjury.

Chap. 23, Art. 1, Sec. 16 of said Code.

While any injured person, or personal representative of a deceased person killed in the course of his employment might make application for an award to which he was not entitled, and when his remedy would be by an action at law under the Federal Employers' Liability Act, and the same might be made in good faith through a misunderstanding as to his rights, but when a person institutes a suit under said Liability Act to recover for the same injury for which he has received compensation under an award, and undertakes to claim, as did respondent in this case, that the compensation paid was a mere gratuity, and that she was never entitled to such compensation, she convicts herself of a violation of the West Virginia statute, and she should not be heard to assert such violation and to thereby avoid the consequences of her act to recover payment twice for the same injury.

See list of above cited cases.

### III

The decision and opinion in this case is contrary to the applicable decisions of this Court.—Schendel v. R. Co., *Supra*.

The trial court erred in not giving to the jury "Instruction No. 5" (R. 73) prayed for by respondent, and for that error said Supreme Court of Appeals should have reversed the judgment complained of.

### IV.

Said Circuit Court of Preston County erred in ruling that defendant would be allowed to prove only such contributions made to the Workmen's Compensation fund as were made for the benefit for Henry C. Riley, or as premiums on his wages (R. 86), and in excluding all other evidence relating to said compensation (R.182).

Said Supreme Court of Appeals should have reversed the judgment of said circuit court for that reason.

### V.

Having held that the award and payment of compensation from the compensation fund of West Virginia was not *res adjudicata* that Henry C. Riley was at the time of his death employed in intrastate commerce, said Circuit Court of Preston County should have admitted evidence of the amount received by respondent under said award of compensation; and for its error in refusing to admit said evidence for said purpose, said Supreme Court of Appeals should have reversed the judgment of said circuit court.

Section 55, Title 45 United States Code.

### ARGUMENT

The theory of the Circuit Court of Preston County with regard to compensation contributions and payments in this case,

and its rulings in the courses of the trial by which it limited what petitioner would be permitted to prove not only to contributions made by petitioner to the Workmen's Compensation Fund, but to those made specifically on account of the wages of Henry C. Riley, were erroneous.

To permit proof of the contributions made to the Workmen's Compensation Fund and reject proof that payments were made from said fund to the respondent would be meaningless, and such rulings ignored the words "that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought," appearing in Section 55 of Title 45 of the Federal Act.

To restrict proof to the contributions made specifically on account of the wages of the injured person or of the deceased employee for whose injury or death the action is brought, ignores the provision of Section 5, Article 2 of Chapter 22 of said Code of West Virginia, which reads as follows:

"All sums received by the State Compensation Commissioner as herein provided shall be deposited in the state treasury to the credit of the Workmen's Compensation Fund in the manner now prescribed by law for depositing money in the state treasury."

It is apparent from this that the Workmen's Compensation fund of said state is like a river, whose waters come from various springs, streams and water courses, and collected into one body serve humanity and contribute fertility and growth along the entire stream, and no one could distinguish from what source any water he might use from that river came. The compensation fund may care for a person on whose wages but one premium had been paid as well as for one on account of whose wages premiums have been paid over a period of years. ....

We again respectfully insist that the decision and order of the Supreme Court of Appeals of West Virginia should be reviewed and reversed, and that the judgment of the Circuit Court of

Preston County should be reversed, and the verdict of the jury should be set aside, and a new trial granted to the petitioner.

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